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Attorney-Client Privilege in the European Communities after *A.M. & S. v. Commission*: The Secret Is Out

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Member of the Class of 1985

I. INTRODUCTION

In *A.M. & S. Europe Ltd. v. Commission of the European Communities*,¹ the Court of Justice of the European Communities² (Court of Justice) considered for the first time the question whether confidential attorney-client communications were privileged against disclosure under Community law.³ The Court of Justice held that such a privilege does exist in Community law, and that it applies in antitrust investigations⁴ undertaken by the Commission of the European Communities⁵

1. 1982 E. Comm. Ct. J. Rep. 1575, [1982] 2 Comm. Mkt. L.R. 264.

2. The Convention Relating to Certain Institutions Common to the European Communities, Mar. 25, 1957, arts. 3 & 4, 298 U.N.T.S. 269, 271, established the Court of Justice of the European Communities [Court of Justice] as the sole judicial institution of the European Coal and Steel Community [ECSC], the European Atomic Energy Community [EURATOM], and the European Economic Community [EEC]. Present members of the European Communities are Belgium, Denmark, Federal Republic of Germany, France, Greece, Italy, Luxembourg, Netherlands, Republic of Ireland, and the United Kingdom [hereinafter referred to as Member States]. See generally J. USHER, *EUROPEAN COURT PRACTICE* 3-7 (1983); Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461, 461-525 (1980); Stuart, *The Court of Justice of the European Communities: The Scope of Its Jurisdiction and the Evolution of Its Case Law under the EEC Treaty*, 3 NW. J. INT'L L. & BUS. 415, 415-27 (1981).

3. The general principles of Community law are discussed in Verstrynge, *The Relationship Between National and Community Antitrust Law: An Overview After the Perfume Cases*, 3 NW. J. INT'L L. & BUS. 358, 369-72 (1981) and Warner, *The Relationship Between European Community Law and the National Laws of Member States*, 93 LAW Q. REV. 349, 349-66 (1977). A significant aspect of Community law is that it acts in derogation of any conflicting national law of a Member State. *Walt Wilhelm and Others v. Bundeskartellamt*, 1969 E. Comm. Ct. J. Rep. 1, [1969] Comm. Mkt. L.R. 100; *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E. Comm. Ct. J. Rep. 629, [1978] Comm. Mkt. L.R. 263.

4. The privilege should apply, a fortiori, to proceedings within the Court of Justice itself. See J. USHER, *supra* note 2, at 216.

5. The Commission of the European Communities [Commission] was created by the Treaty Establishing a Single Council and a Single Commission of the European Communities, done Apr. 8, 1965, entered into force July 1, 1967, art. 9, 10 J.O. COMM. EUR. 152 (1967)

(Commission). The Court of Justice, however, recognized only a limited right of corporate clients to refuse to disclose their confidential communications with counsel. Specifically, only communications between an independent attorney and a client, for "purposes of the client's defense" were recognized as falling within the privilege.⁶

United States federal and state courts, and the Federal Trade Commission,⁷ in contrast, recognize a comparatively broad attorney-client privilege⁸ of nondisclosure in communication on legal matters between attorneys and their corporate clients.⁹ This privilege exists even when the attorney and client share an employment relationship, as in the case of in-house counsel,¹⁰ and when the communication is not made in anticipation of litigation.¹¹ In fact, United States courts

reprinted in *ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW: EUROPEAN COMMUNITY TREATIES* B8030, B8033 (1984) [hereinafter cited as *Merger Treaty*], to assume jurisdiction over a broad scope of executive and legislative functions of the ESCS, EURATOM, and the EEC. See also *Treaty Establishing the European Economic Community*, Mar. 25, 1957, arts. 124 & 155, 298 U.N.T.S. 11, 63, 71 (entered in force Jan. 1, 1958) [hereinafter cited as *EEC Treaty*].

6. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1611-12, [1982] 2 Comm. Mkt. L.R. at 323-24.

7. The usual laws of privilege apply in Federal Trade Commission [FTC] investigative hearings, document discovery and adjudicative proceedings. See 16 C.F.R. § 3.31(b)(2), § 2.8A(a), § 2.9(b)(2) & § 2.11(b) (1984).

8. See generally 8 J. WIGMORE, *EVIDENCE* § 2292, at 554-57 (McNaughton rev. 1961), for a general statement of the United States attorney-client privilege. See also *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.6 (Final Draft 1982).

9. United States courts frequently describe the attorney-client privilege as "narrow" or "strictly construed." See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); *NLRB v. Harvey*, 349 F.2d 900, 907 (4th Cir. 1965). See also 8 J. WIGMORE, *supra* note 8, § 2291, at 545-54. The United States privilege, even narrowly construed, however, protects a far broader range of communications between attorney and client than does the Community privilege. For example, in-house corporate counsel may claim the United States privilege. See *infra* note 10. The same is true in England. See *Alfred Crompton Amusement Machinery Ltd. v. Commissioners of Customs and Excise* (No. 2), [1972] 2 Q.B. 102, [1972] 2 All E.R. 353, 376-77.

10. Existence of the United States attorney-client privilege is not determined by the relationship of the attorney to the corporation per se, but by the relationship between the attorney and the particular agents of the corporation for whom the privilege is claimed, the substance of the communication, waiver of the privilege and the existence of a specific exception preventing its application. See *Upjohn v. United States*, 449 U.S. 383 (1981); *United States v. International Business Machine Corp.*, 66 F.R.D. 206 (S.D.N.Y. 1974); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), cert. denied 439 U.S. 955 (1978). See also McKenney, *The Attorney-Client Privilege and Work Product Immunity: An In-Depth Analysis of the Doctrines and Their Application to Corporate Affairs*, 88 *COM. L.J.* 10, 10-27 (1983). United States attorneys employed by entities managed by non-attorneys do have an ethical obligation to maintain professional independence. *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 5.4 (Final Draft 1982).

11. 8 J. WIGMORE, *supra* note 8, § 2294, at 558-65. Cf. *FED. R. CIV. P.* 26(b)(3) in

have largely *assumed* that the attorney-client privilege applies fully to corporate clients,¹² without any detailed legislative or judicial treatment of the subject.¹³ Attorneys practicing in the United States rely upon the attorney-client privilege in structuring their conduct toward clients.¹⁴ United States attorneys and clients who are subject to European Community jurisdiction¹⁵ should be aware that professional confidentiality is treated quite differently under Community law.

This Note examines the evolving principle of attorney-client privilege in Community law. The discussion will focus initially upon the Court of Justice's decision in the *A.M. & S.* case. Next, this Note considers several issues in the Community law of attorney-client privilege that were left unresolved by *A.M. & S.* This Note concludes with a summary of the Community law of attorney-client privilege. Although not a comparative study, this Note provides reference to United States law when a comparative treatment is elucidating.

II. THE *A.M. & S.* DOCTRINE

A. Facts of the Case

A.M. & S. arose during the Commission's investigation of several companies in the zinc industry that were suspected of price-fixing, tampering with supply and dividing markets in violation of Community antitrust laws.¹⁶ In February 1979 Commission agents searched the Bristol, England premises of *A.M. & S.* During the two-day search Commission agents seized approximately thirty-five documents and left the company's managing director with a written request specifying additional papers to be provided to the Commission. Pursuant to that request, the managing director surrendered seven files of documents, but refused to produce several other documents on the ground that they were protected under the doctrine of professional privilege recognized in England.¹⁷ *A.M. & S.* described to the Commission the retained

which the qualified immunity accorded to attorney "work product" exists only for materials obtained by an attorney "in anticipation of litigation or for trial." See also *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977).

12. Gergacz, *Attorney-Corporate Client Privilege*, 37 BUS. LAW. 461, 475-76 (1982).

13. *Id.*

14. See e.g., *id.* at 513.

15. See generally Barav, *supra* note 2.

16. Such practices are prohibited by the EEC Treaty, *supra* note 5, arts. 85 & 86, 298 U.N.T.S. at 47-49, which are the EEC's substantive antitrust laws.

17. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1579, [1982] 2 Comm. Mkt. L.R. 267. Attorney-client privilege is discussed at length in *Wagh v. British Ry. Bd.*, [1979] A.C. 521, [1979] 2 All E.R. 1169.

documents' contents, and offered to reveal portions of the documents, in an apparent attempt to establish a factual basis for the privilege claim.¹⁸

In July 1979 the Commission ordered A.M. & S. to produce, *inter alia*, all documents for which the privilege was claimed.¹⁹ In a formal decision, the Commission categorically denied the existence of an attorney-client privilege in Community law, but indicated that it would respect the confidentiality of written legal communications used in the defense of a firm being investigated when the laws of the Member State in which the search was conducted recognized such a privilege.²⁰ The Commission further stated that the existence of a privilege would be determined in each case by the Commission itself, following an examination of the allegedly privileged documents by a Commission agent.²¹

Despite the Commission's decision, A.M. & S. again refused to relinquish possession of the contested documents. The Commission refused to base a determination of the existence of a privilege upon a partial viewing of the documents. In October 1979 A.M. & S. commenced an action in the Court of Justice challenging the Commission's order,²² further defiance of which might have subjected A.M. & S. to penalties for obstructing the Commission's investigation of A.M. & S.'s trade practices.²³

B. Decision of the Court of Justice

In a decision rendered in May 1982, the Court of Justice analyzed the *A.M. & S.* case in terms of three major issues: (1) whether Community law recognized an attorney-client privilege and, if so, what standards governed its application; (2) what procedures should be followed to determine the existence of a privilege in each case, viz. who should rule on its applicability; and (3) which of the documents that A.M. & S. refused to yield were covered by the privilege.²⁴

18. See *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1626, [1982] 2 Comm. Mkt. L.R. at 279 (Opinion of Advocate General).

19. 22 O.J. EUR. COMM. (No. L 199) 31, 32 (1979).

20. *Id.*

21. *Id.* at 32-33.

22. The EEC Treaty, *supra* note 5, art. 173, 298 U.N.T.S. at 75-76, empowers private parties to bring "direct actions" before the Court of Justice to challenge "the legality of acts of the Council and the Commission other than recommendations or opinions."

23. See Council Regulation No. 17 of Feb. 6, 1962, 5 J.O. COMM. EUR. (1962) [hereinafter cited as Regulation 17]. Penalties for noncompliance with Regulation 17 may be in the form of fines or coercive "periodic payments." *Id.* arts. 15(1)(c) & 16(1)(d).

24. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1605-18, [1982] 2 Comm. Mkt. L.R. at 318-27.

1. The Community Principle of "Legal Confidentiality"

After finding that the Commission possessed a general power to seize written communications between attorneys and corporate clients which are relevant to antitrust investigations,²⁵ the Court of Justice decided that the Commission's investigatory powers were limited by a "principle of legal confidentiality."²⁶ The Court of Justice recognized, as a point of fact, that all of the Member States had, in some form, a policy that "any person must be able, without constraint, to consult a lawyer."²⁷ The court noted, however, that the Member States' domestic laws varied widely in scope and in the criteria for applying an attorney-client privilege in domestic proceedings.²⁸ Furthermore the Member States also differed in the policies recognized in their domestic law as supporting the privilege.²⁹

After comparing the Member States' national laws, the Court of Justice concluded:

[T]here are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purpose and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.³⁰

By employing what has been described as a "common denominator" analysis³¹ the Court of Justice held that the Community law of attorney-client privilege encompassed the common elements of the Member States' domestic laws of attorney-client privilege, as described

25. In *id.* at 1609-10, [1982] 2 Comm. Mkt. L.R. at 322, the Court of Justice held that Regulation 17, *supra* note 23, art. 14, "empowers the Commission to require production . . . [of] documents concerning the market activities of the undertaking [W]ritten communications between lawyer and client fall, in so far as they have a bearing on such activities, within [this] category of documents."

26. Regulation 17, *supra* note 23, art. 20, expressly prohibits the Commission from disclosing secrets obtained in its investigations. This differs from the question addressed in *A.M. & S.* as to an entity's right to refuse to disclose confidential communications to the Commission.

27. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1610, [1982] 2 Comm. Mkt. L.R. at 323.

28. *Id.*, [1982] 2 Comm. Mkt. L.R. at 323.

29. *Id.* at 1610-11, [1982] 2 Comm. Mkt. L.R. at 323.

30. *Id.* at 1611, [1982] 2 Comm. Mkt. L.R. at 323.

31. Forrester, *Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the A M & S Judgment*, 20 COMMON MKT. L. REV. 75, 82 (1983). See *infra* text accompanying notes 112-23.

in the above-quoted passage.³² Thus, *A.M. & S.* established that written communications made between a client and an independent attorney which are prepared "for the purposes and in the interests of the client's rights of defence" need not be disclosed to Commission agents in an antitrust investigation.³³ The Court of Justice held that the privilege applies to all written communications made after legal proceedings are initiated, and to earlier communications which relate to the subject matter of the proceedings.³⁴ Furthermore, the court ruled that the privilege is held by the client and may be waived at the client's discretion.³⁵

2. Policies Advanced

The Court of Justice advanced two grounds for the rule adopted in *A.M. & S.* First, the court held that attorney-client privilege is, to an extent, a defendant's right, which should be recognized in Community law.³⁶ Second, the court recognized that the Community rule of attorney-client privilege should include factors that would discourage its abuse.³⁷

In its briefs, *A.M. & S.* argued that attorney-client privilege was a fundamental human right.³⁸ Advocate General Jean-Pierre Warner,³⁹ and presumably the Court of Justice, rejected this claim, however, on the ground that neither the European Convention for the Protection of

32. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1611, [1982] 2 Comm. Mkt. L.R. at 323.

33. *Id.*, [1982] 2 Comm. Mkt. L.R. at 323.

34. *Id.*, [1982] 2 Comm. Mkt. L.R. at 323.

35. *Id.* at 1612-13, [1982] 2 Comm. Mkt. L.R. at 324-25. Here the Court of Justice deviates slightly from the "common denominator" analysis as in France a lawyer may unilaterally prevent disclosure of confidential communications with a client. See P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 77 (1967).

36. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1611, [1982] 2 Comm. Mkt. L.R. at 323-24.

37. *Id.* at 1612, [1982] 2 Comm. Mkt. L.R. at 324.

38. *Id.* at 1636, [1982] 2 Comm. Mkt. L.R. at 290-91 (Opinion of Advocate General). Older United States cases allude to the right of the client "freely and fully [to] confer and confide" in a lawyer. *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956). Recent United States cases stress the public ends served by the privilege, particularly that of fostering compliance with the law by the unimpeded exchange of legal information between counsel and client. See *Upjohn v. United States*, 449 U.S. 383, 389 (1981); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 384 (D.D.C. 1978); *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied* 401 U.S. 974 (1971).

39. The Court of Justice staff includes five Advocates General who assist the court by delivering "impartial and independent" opinions on the issues in each case. EEC Treaty, *supra* note 5, art. 166, 298 U.N.T.S. at 74. Since the court often adopts the reasoning of the Advocates General it is useful to study their opinions, which are published with the court's consensus opinions. See Toepke, *The European Economic Community—A Profile*, 3 Nw. J. INT'L L. & Bus. 640, 651 (1981).

Human Rights and Fundamental Freedoms,⁴⁰ nor the constitution of any Member State recognizes a fundamental right of confidentiality between attorney and client.⁴¹ The Court of Justice did, however, find that the regulations vesting the Commission with broad powers of search and seizure were designed to ensure that the rights of the defense were adequately protected.⁴² The court stated that attorney-client privilege was an essential corollary to those rights⁴³ but that the scope of the privilege is limited in the interest of furthering other policies, such as ensuring the Commission's access to facts regarding unlawful trade practices.⁴⁴

The Court of Justice thus indicated that only communications related to specific duties in connection with a client's defense are protected.⁴⁵ It should be noted, however, that the court declared that communications will be privileged even if they are made before an investigation is commenced.⁴⁶ This is borne out by the fact that the documents held to be protected in *A.M. & S.* were drafted some six years before the Commission searched the company's premises.⁴⁷

The second major consideration behind the court's formulation of the Community attorney-client privilege was the court's desire to use the privilege to further, rather than to obstruct, the administration of justice. The court stated that the attorney's role was to collaborate with the courts in administering justice.⁴⁸ Attorneys who are bound to their clients by a relationship of employment, the court reasoned, cannot pursue justice with requisite independence.⁴⁹ Furthermore, the Court of Justice noted that in-house counsel are not accorded full professional status in some Member States,⁵⁰ and are not, in those States,

40. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

41. See *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1636, [1982] 2 Comm. Mkt. L.R. at 290-91 (Opinion of Advocate General).

42. *Id.* at 1611, [1982] 2 Comm. Mkt. L.R. at 290-91.

43. *Id.*, [1982] 2 Comm. Mkt. L.R. at 290-91.

44. *Id.* at 1609, 1612, [1982] 2 Comm. Mkt. L.R. at 322, 324. See also 1982 E. Comm. Ct. J. Rep. at 1655-56, [1982] 2 Comm. Mkt. L.R. at 310 (Opinion of Advocate General).

45. *Id.* at 1614, [1982] 2 Comm. Mkt. L.R. at 326. Cf. Forrester, *supra* note 31, at 82.

46. *Id.* at 1611, [1982] 2 Comm. Mkt. L.R. at 323.

47. *Id.* at 1614, [1982] 2 Comm. Mkt. L.R. at 326.

48. *Id.* at 1611-12, [1982] 2 Comm. Mkt. L.R. at 324.

49. *Id.*, [1982] 2 Comm. Mkt. L.R. at 324.

50. See *id.* at 1655, [1982] 2 Comm. Mkt. L.R. at 309-10 (Opinion of Advocate General). In Germany, for instance, in-house lawyers cannot represent their employers in court or before arbitration tribunals. Bundesrechtsanwaltsordnung § 46, 1959, Bundesgesetzblatt [BGBI] 1565 (W. Ger.) Because of this fact, Community law defers to national policy on the issue of "salaried" lawyers' competency to represent their employers in legal proceedings.

subject to rules of professional ethics.⁵¹ The court seems to have reasoned that attorneys who are not subject to professional discipline have no disincentive to abuse an attorney-client privilege, and therefore should not be granted its protection. Hence emerged the rule that the Community attorney-client privilege applies only to independent counsel, *i.e.*, attorneys consulted for a fee but not employed by their clients.⁵²

3. Procedural Issues

After finding that an attorney-client privilege does exist in Community law, the Court of Justice faced the issue of who would determine if and when the privilege applied.⁵³ The court rejected the Commission's contention that the Commission itself should determine when the confidentiality principle applied. The court also refused to accept that such issues should be brought before the Member State's domestic courts.⁵⁴ The court held:

Since this is a matter involving an appraisal and a decision which affect the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition, the solution of disputes as to the application of the protection of the confidentiality of written communications between lawyer and client may be sought only at Community level.⁵⁵

The court went on to rule that an entity against which discovery of attorney-client communications is sought must, in the first instance, provide Commission agents with relevant material to demonstrate that the communications are privileged.⁵⁶ At that point the entity is not

Council Directive 77/249 of Mar. 22, 1977 on Freedom of Lawyers to Provide Services, art. 6, 20 O.J. EUR. COMM. (No. L 78) 17, 18 (1977).

51. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1655, [1982] 2 Comm. Mkt. L.R. at 309-10 (Opinion of Advocate General).

52. See *infra* note 93 for the text of an American Bar Association resolution asking the Council of Ministers to "study" and "extend" the privilege to in-house counsel.

53. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1606-08, [1982] 2 Comm. Mkt. L.R. at 318-21 (Judgment).

54. This could also be a substantive issue. For instance, the British Government, intervenor in *A.M. & S.*, argued that the law of professional privilege of the Member State in which documents are found should apply. *Id.* at 1640, [1982] 2 Comm. Mkt. L.R. at 295 (Opinion of Advocate General). Advocate General Warner supported using national courts as fora for applying Community law in legal privilege cases. *Id.*

55. *Id.* at 1613, [1982] 2 Comm. Mkt. L.R. at 325.

56. *Id.*, [1982] 2 Comm. Mkt. L.R. at 325. See also Commission Decision 82/756, 25 O.J. EUR. COMM. (No. L 319) 12, 14 (1982), where the Commission, in its only published

required to reveal the contents of the communications in question.⁵⁷ If the Commission is not satisfied that the privilege applies, and if the entity refuses to supply additional probative material, the entity may petition the Court of Justice for relief from any penalty imposed by the Commission for the entity's failure to cooperate with the investigation.⁵⁸ Once lodged in the Court of Justice, privilege claims would usually be heard by a Chamber composed of three judges.⁵⁹ While the Chambers may, at any stage, refer cases to the Court of Justice en banc,⁶⁰ decisions of the three-judge panels are not appealable.⁶¹

4. The A.M. & S. Documents

The contested documents in *A.M. & S.* included: (1) requests from company agents to private lawyers for legal advice; (2) communications from private attorneys to company agents containing legal advice; and (3) documents created by, and circulated among, company executives summarizing legal advice received from private attorneys.⁶² These communications took the form of letters, telexes, and memoranda. Though it is not expressly stated in the *A.M. & S.* opinion, the court apparently held that documents in group (3), the summaries by executives, were not protected as they originated outside of the attorney-client relationship.⁶³ Since the documents in groups (1) and (2) were

application of the *A.M. & S.* standard, stated that the Commission, not the investigated entity, would determine what material is relevant.

57. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1613, [1982] 2 Comm. Mkt. L.R. at 325. See *infra* text accompanying notes 99-111.

58. *Id.* See also Regulation 17, *supra* note 23, art. 17, and EEC Treaty, *supra* note 5, arts. 172 & 173, 298 U.N.T.S. at 75-76. Commencing an appeal of a Commission decision in the Court of Justice does not automatically stay the effect of a penalty imposed by the decision. *Id.*, art. 185, 298 U.N.T.S. at 78. A claimant may petition the Court of Justice, however, for an interim order suspending operation of the penalty pending judicial review of the conflict. See Rules of Procedure of the Court of Justice of the European Communities (consolidated version), art. 83, 25 O.J. EUR. COMM. (No. C 39) 1, 20 (1982) [hereinafter cited as Rules of Procedure].

59. EEC Treaty, *supra* note 5, art. 165, 298 U.N.T.S. at 73-74; Protocol on the Statute of the Court of Justice of the European Communities, Apr. 17, 1957, art. 15, 298 U.N.T.S. 147, 150 [hereinafter cited as Statute of the Court]; Rules of Procedure, *supra* note 58, arts. 9, 26, 46 & 95(1).

60. Rules of Procedure, *supra* note 58, art. 95(1) § 4. See, e.g., *Mills v. European Investment Bank*, 1976 E. Comm. Ct. J. Rep. 955, 967. See also *J. USHER*, *supra* note 2, at 172-76. *A.M. & S.* was decided by the court en banc, presumably because the case was one of first impression.

61. The EEC Treaty, *supra* note 5, art. 165, 298 U.N.T.S. at 73-74, expressly gives the Court of Justice's Chambers the power to "adjudicate" certain cases.

62. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1643-44, [1982] 2 Comm. Mkt. L.R. at 298-99 (Opinion of Advocate General).

63. C. KERSE, EEC ANTITRUST PROCEDURE 29, § 8.13-8.17 (Supp. 1982).

prepared by private attorneys, the requirement of "independent" counsel was met and the sole remaining issue in determining whether the privilege applied to those documents was whether the documents were prepared for purposes of A.M. & S.'s defense.

The Court of Justice found the documents in groups (1) and (2) to contain primarily legal advice and opinions of counsel on A.M. & S.'s potential antitrust liability under Community law after the United Kingdom's accession to the Community in 1973.⁶⁴ In so finding the court held these written communications between A.M. & S. and its private attorneys to be protected against disclosure to Commission agents.⁶⁵ The court did not consider any evidence of the Commission's investigatory need for the documents,⁶⁶ thus suggesting that the privilege, once found, is absolute, and that privileged documents are beyond the Commission's investigatory reach.⁶⁷

III. UNANSWERED QUESTIONS

The *A.M. & S.* decision left unanswered several questions regarding the Community's attorney-client privilege. Among the outstanding questions are the following: (1) whether attorneys who are not admitted to the bar of a Member State are protected by the privilege; (2) by what conduct, and by whom, may the privilege be waived; (3) whether *in camera* inspection of all contested documents will be required; and (4) what are the implications of *A.M. & S.* with respect to the rules of decision applied by the Court of Justice in areas of Community law which, like the attorney-client privilege issue, are not addressed by Community treaties or legislation.⁶⁸

A. Non-Community Lawyers May Not Be Protected

A.M. & S. established that attorneys must not be bound to their clients by a relationship of employment if their clients hope to rely upon the Community attorney-client privilege; the attorney must be in-

64. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1614, [1982] 2 Comm. Mkt. L.R. at 326.

65. *Id.* at 1614-15, [1982] 2 Comm. Mkt. L.R. at 326.

66. *Id.* at 1614, [1982] 2 Comm. Mkt. L.R. at 326.

67. This contrasts with the qualified immunity from search and seizure granted to "agents, advisers and lawyers" appearing before the Court of Justice. The court may "waive [that] immunity where it considers that the proper conduct of proceedings will not be hindered thereby." Rules of Procedure, *supra* note 58, arts. 32-34.

68. Query also how national courts of Member States will regard information which is required to be disclosed under Community law, but which would be protected under national law.

dependent for the privilege to apply.⁶⁹ Hence, in-house counsel are never protected, regardless of the legal or nonlegal nature of communications with their corporate employers.⁷⁰ The *A.M. & S.* court indicated in dicta that yet a further qualification may exist barring some independent attorneys from claiming the privilege.⁷¹ The Court of Justice stated that the attorney-client privilege applies to attorneys who are "entitled to practise [their] profession in one of the Member States."⁷² The issue suggested here is whether communications with non-Community attorneys are ever privileged against examination and seizure by the Commission. C. Kerse,⁷³ a British legal commentator, suggests that communications with attorneys who are not qualified to practice before a Member State's domestic courts will not be privileged in Commission proceedings under *A.M. & S.*⁷⁴

Kerse compared the English and French texts of the *A.M. & S.* opinion and noted a disparity in word choice (or translation) that would make the difference as to whether clients of non-Community attorneys, including United States attorneys, may claim the privilege. The English text states that the privilege applies "without distinction to any lawyer entitled to practice his profession in" a Member State.⁷⁵ This suggests that non-Community attorneys who are entitled to practice within Community territory would be protected. The French text, however, reads "*avocat inscrit au barreau*,"⁷⁶ which was translated in the Protocol to the Statute of the Court of Justice⁷⁷ to mean an attorney entitled to practice *before* a court of a Member State,⁷⁸ a qualification that would not be met by attorneys admitted to the bar only in non-Community jurisdictions.⁷⁹ If the French text accurately states the rule in *A.M. & S.*, then communications from United States attorneys to their clients in Europe are not protected from disclosure to the

69. See *supra* text accompanying notes 30-33.

70. Compare the United States law, *supra* note 10.

71. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1612, [1982] 2 Comm. Mkt. L.R. at 324.

72. *Id.*, [1982] 2 Comm. Mkt. L.R. at 324.

73. C. Kerse, LL.B., Solicitor, author of EEC ANTITRUST PROCEDURE (1980).

74. C. KERSE, *supra* note 63 at § 8.17.

75. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1612, [1982] 2 Comm. Mkt. L.R. at 324.

76. The French text reads: "*La protection ainsi accordée . . . doit s'appliquer indistinctement à tous les avocats inscrits au barreau de l'un des États membres, quel que soit l'État membre où réside le client.*" *A.M. & S. Europe Ltd. v. Commission des Communautés européennes*, 1982 C. J. Comm. E. Rec. 1575, 1612.

77. Statute of the Court, *supra* note 58, art. 17.

78. C. KERSE, *supra* note 63 (emphasis added).

79. *Id.*

Commission.⁸⁰

One reason for regarding the English text as stating the correct rule is that English was the language of the case in *A.M. & S.* Under the court's rules of procedure,⁸¹ each case is designated to be conducted in one of eight languages.⁸² All written and oral argument, supporting documents and the minutes and decisions of the court are presented in the designated language.⁸³ The court's decisions are later published in seven languages, six in translation.⁸⁴ Since the *A.M. & S.* court dealt in English with that case, the English phraseology may most accurately reflect the court's intended result. The fact that French has served as the court's internal "working language,"⁸⁵ however, weakens the suggestion that the English text should be followed. The judges of the court may be more sensitive to the French meaning of terms than they are to the English meaning, particularly in using phrases that have appeared in other Community texts. Community law has no clear rule as to which translation controls in an apparent conflict of interpretations, such as the one which appears to exist between the English and French texts of *A.M. & S.* Only the Court of Justice itself has the power to definitively resolve the conflicting interpretations of *A.M. & S.*⁸⁶

Approached differently, the absence of express language in *A.M. & S.* excluding non-Community counsel and the lack of discussion of the policies supporting exclusion indicates that the court may not have actually considered the issue. An American Bar Association [ABA] study⁸⁷ concluded that in stating that the privilege must apply "without

80. Cf. UNIF. R. EVID. § 502(a)(3) (1974) which states: "A 'lawyer' is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation." (emphasis added); See also CAL. EVID. CODE § 950 (West 1984). The Court of Justice stated in *E.M.I. Records Ltd. v. C.B.S. United Kingdom Ltd.*, 1976 E. Comm. Ct. J. Rep. 811, 827, [1976] 2 Comm. Mkt. L.R. 235, that application of the Community antitrust laws is not conditioned upon notions of "reciprocity" vis-à-vis states outside of the Community. The court might thus be unreceptive to an argument that the liberal treatment accorded foreign lawyers under United States law should affect the court's decision on whether the Community legal privilege applies to United States lawyers.

81. Rules of Procedure, *supra* note 58, art. 29(1)(2), §§ 1-5.

82. *Id.*, art. 29(1)(2), §§ 1 & 2. The eight languages are Danish, Dutch, English, French, German, Greek, Irish and Italian. *Id.*

83. *Id.* § 3.

84. *Id.* art. 30, § 2. See also 1 J.O. COMM. EUR. 385 (1958).

85. L. BROWN & F. JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 15 (1977).

86. Under the Statute of the Court, *supra* note 58, art. 40, any party or Community institution may petition to have the Court of Justice construe the meaning or scope of a previous decision.

87. *Report to the House of Delegates*, 1982 A.B.A. SEC. INT'L L. & PRAC. REP. NO. 301. [hereinafter cited as A.B.A. REPORT NO. 301].

distinction to any lawyer entitled to practice his profession in one of the member-States [sic],” the court may only have meant that *A.M. & S.* would apply without discrimination to attorneys of the Member States, without excluding otherwise qualified non-Community attorneys.⁸⁸ Another interpretation of the “entitled to practice” language would be that it states a rule that only communication with duly admitted members of a national bar will give rise to the privilege.

Fortunately, the *A.M. & S.* opinion does not foreclose the possibility that the attorney-client privilege covers independent members of *any* bar. The disputed language of *A.M. & S.* would permit the Court of Justice, with little embarrassment, to assure that the attorney-client privilege extends to communications with non-Community attorneys. The court could simply hold in a future case that the English text accurately stated the rule in *A.M. & S.*

The Court of Justice should conclude that communications with United States attorneys are protected by the Community’s attorney-client privilege. Like their Community counterparts, United States attorneys are bound by a code of professional ethics⁸⁹ which applies to United States attorneys practicing abroad.⁹⁰ While attorneys who are unable to practice before Member States’ courts may be less likely to communicate “for purposes of a client’s defense” with regard to specific litigation, it cannot be presumed that United States attorneys are not involved in the kind of pre-litigation or preventive counseling that the British solicitors conducted for *A.M. & S.*⁹¹ In view of the limited nature of the privilege recognized in *A.M. & S.*, the Court of Justice would strain to find a cognizable cost to the Community from also protecting clients of United States attorneys.

The Court of Justice’s extending the attorney-client privilege to cover United States attorneys would be a logical recognition of the interdependence of United States and European business and legal communities.⁹² At best, the policy of *A.M. & S.*, as interpreted to deny protection to communications with United States attorneys, creates unnecessary administrative inefficiencies for the clients and attorneys involved. Attorneys attempting to protect their advice to clients may feel

88. *Id.* at 5.

89. MODEL RULES OF PROFESSIONAL CONDUCT (Final Draft 1982).

90. *Id.* Rule 8.5.

91. See *supra* text accompanying notes 62-64.

92. For a compilation of United States government data on U.S.-European interdependence, see A.B.A. REPORT NO. 301, *supra* note 87, at 18.

compelled to funnel all written client communications through local Community counsel.

At worst, such a rule increases the likelihood that the minimal privacy protection offered to clients under *A.M. & S.* will not be available to a client, solely because the client communicated with non-Community counsel. This result would foil the court's stated policy objective of protecting investigated parties' defense rights by depriving clients of a choice of counsel and by withholding protection as to documents which were drafted by non-Community lawyers prior to the *A.M. & S.* decision. Until the court resolves the differing interpretations of *A.M. & S.*, or until the Council addresses the issue, however, non-Community attorneys should probably consider their confidential written communications with clients to be unprotected under an ambiguous Community standard.

In February 1983 the ABA House of Delegates adopted a resolution requesting the Commission of the European Communities to give force to the attorney-client privilege whether it is asserted by a client of Community or non-Community counsel, and to study the possibility of extending the privilege to in-house counsel.⁹³ Even if the Commission agrees to recognize the privilege as applicable to non-Community attorneys, this recognition would only be a self-imposed administrative policy, which could be withdrawn or changed at any time by the Commission. Nothing less than Council legislation, or a definitive word from the Court of Justice will assure long-term protection for clients of non-Community attorneys. Nonetheless, the United States State Department's Mission to the European Communities reportedly supports the ABA recommendations, and there are even indications that the Commission will propose to the Council that non-Community attor-

93. The ABA House of Delegates adopted the following resolution at its 1983 midyear meeting:

Be It Resolved, That the American Bar Association requests the Commission of the European Communities, when conducting a competition inquiry pursuant to Article 11 or 14 of Regulation 17, to grant to an undertaking the same protection, including the same procedural safeguards, against disclosure of written communications with a U.S. lawyer that Community law accords to a client's written communications with a lawyer of a Member State of the European Community.

Be It Resolved, That, as a separate matter from the above resolution, the American Bar Association requests the Commission of the European Communities to study and extend the attorney-client privilege to house counsel, whether of Member States of the Communities, or otherwise.

SUMMARY OF ACTION OF THE HOUSE OF DELEGATES (1983) at 20.

neys be covered explicitly by the attorney-client privilege.⁹⁴

B. Waiver of Protection

In *A.M. & S.* the Court of Justice held that the Community attorney-client privilege did not bar clients from disclosing communications with their attorneys.⁹⁵ Thus, in the language of United States courts, the privilege is held by the client, *i.e.*, the client may waive the protection, whether or not the attorney agrees. In the context of Community law this means that an entity may voluntarily surrender attorney-client communications to Commission investigators when the entity believes it advantageous to do so.⁹⁶ While an unqualified, voluntary surrender of the documents would certainly constitute such a waiver, a question is raised as to whether more equivocal conduct of the client will also be interpreted as a permanent waiver of the client's right to assert that documents are protected from disclosure on the ground of attorney-client privilege.

Unfortunately, Community law has not yet developed a discernible waiver doctrine, and the *A.M. & S.* case sheds no light on how the Court of Justice would resolve waiver questions. Since the court seems inclined to interpret attorney-client privilege issues with reference to the common legal traditions of the Member States,⁹⁷ a comparative examination of these traditions may be useful in ascertaining the Community law on specific waiver issues. Given the dissimilarity between the attorney-client privilege in the United States and in Community law, it would be unsafe for United States attorneys to presume that principles of waiver recognized in the United States will apply, or even be considered by the Court of Justice, in determining Community law.⁹⁸

C. *In Camera* Inspection of Contested Documents

The *A.M. & S.* opinion does not state whether contested documents lodged with the Court of Justice would necessarily be subject to *in camera* inspection by the judges. Nor does it state whether a claim-

94. See Report on International Trade Developments 8 (Nov. 1983) (published by Cleary, Gottlieb, Steen & Hamilton, Washington, D.C.).

95. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1613, [1982] 2 Comm. Mkt. L.R. at 324-25.

96. *Id.*

97. See *infra* notes 112-19 and accompanying text.

98. The author's LEXIS search of 1830 Court of Justice cases indicated that the court has cited United States law as authority in only 41 cases. (The search was undertaken on Jan. 20, 1984, and encompassed a cross-search of the key words "United States," "U.S.," and "American" with "law," "courts" and "rule.")

ant would be allowed to make a *prima facie* showing of privilege using evidence outside the documents themselves and voluntarily disclosed portions of the documents.⁹⁹ The Court of Justice's jurisdiction to order *in camera* inspection of documents is clear under the court's enabling statute¹⁰⁰ which states that "[t]he Court [of Justice] may require the parties to produce all documents and to supply all information which the Court considers desirable."¹⁰¹

Advocate General Jean-Pierre Warner stated in *A.M. & S.* that "the only satisfactory way of deciding whether a document is entitled to protection is by allowing someone to look at it."¹⁰² Although the experience of the United States courts¹⁰³ challenges the accuracy of Warner's view, the treatment of the contested documents in *A.M. & S.* suggests that the Court of Justice may accept Warner's view. In *A.M. & S.* the company deposited the contested documents, sealed, with the Court of Justice before the court adjudicated the merits of the company's claim.¹⁰⁴ The court ruled upon the privilege's applicability to the *A.M. & S.* documents with reference to their actual contents.¹⁰⁵

A commentator suggests that the Court of Justice lacks the administrative capacity to deal effectively with a deluge of applications to resolve disputes arising on the issue of attorney-client privilege.¹⁰⁶ The bulk of this increased workload would fall upon the court's Chambers, which will decide most professional privilege cases,¹⁰⁷ and particularly upon the Advocates General, who must deliver an opinion in every

99. United States federal courts sometimes order *in camera* inspection of contested documents. See e.g., *Continental Coatings Corp. v. Metco, Inc.*, 50 F.R.D. 382, 384 (N.D. Ill. 1970); *Schwimmer v. United States*, 232 F.2d 855, 864 (8th Cir. 1956); *U.S. v. Tratner*, 511 F.2d 248, 253-54 (7th Cir. 1975). See also *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). But see *F.T.C. v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980). Administrative Law Judges in FTC proceedings may require *in camera* inspection of documents only in "unusual and exceptional circumstances." See 16 C.F.R. § 3.45 (1983). Compare the view of some state courts, *infra* at note 111.

100. Statute of the Court, *supra* note 59, art. 21, 298 U.N.T.S. at 152. Unlike the Commission under Regulation 17, the Court of Justice cannot impose monetary sanctions for a party's failure to produce requested documents. The court may, however, take "formal notice" of the failure, and may base an adverse finding upon a lack of requested evidence. *Id.* See also *USHER*, *supra* note 1, at 193.

101. Statute of the Court, *supra* note 58, art. 21.

102. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1637, [1982] 2 Comm. Mkt. L.R. at 291.

103. See *infra* note 109.

104. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1603-04, [1982] 2 Comm. Mkt. L.R. at 270.

105. *Id.*, [1982] 2 Comm. Mkt. L.R. at 270.

106. See Fox, *Professional Privilege in EEC Law*, 127 SOLIC. J. 233, 236 (1983).

107. See *supra* notes 59-61 and accompanying text.

case before the court, including cases in Chambers.¹⁰⁸ Requiring *in camera* inspection of each contested document would increase this burden, especially in antitrust litigation, where investigations may involve many documents.

The Court of Justice could prevent this anticipated problem by allowing parties claiming the legal privilege to show circumstantially the facts giving rise to the privilege for groups or classes of documents, rather than requiring *in camera* inspection of each contested document.¹⁰⁹ In fact, the court has already sanctioned such a procedure by allowing claimants to demonstrate circumstantially to the Commission that documents are privileged. Since the court's procedural rules require parties to annex to their pleadings a file containing all supporting documents,¹¹⁰ however, parties will probably be inclined to submit the contested documents until the court announces a different rule.

Furthermore, by requiring *in camera* inspection of all documents for which protection is claimed, the court would appear to presume that the evidence already shown to the Commission was insufficient in itself to establish a valid claim under the Community legal privilege. If the Court of Justice truly seeks to protect privacy in the attorney-client relationship, then it should consider the extent to which *in camera* inspection defeats that purpose by exposing confidential documents to the judges hearing the case.¹¹¹

D. Rules of Decision

It has been stated that the Court of Justice employed a "common denominator" analysis in arriving at the rule in *A.M. & S.*¹¹² By this it is meant that the Community law of attorney-client privilege was held by the court to include only those rules of attorney-client privilege held

108. Statute of the Court, *supra* note 59, art. 18; Rules of Procedure, *supra* note 58, art. 10.

109. Blanket assertions of attorney-client privilege are not permitted in United States federal courts. *See* F.T.C. v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980) (*citing* Radiant Burners, Inc. v. American Gas Assoc., 320 F.2d 314, 324 (7th Cir. 1963)). But circumstantial evidence of a privilege's existence can be applied simultaneously to a class of documents to which the evidence would apply severally. *See, e.g.,* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).

110. Rules of Procedure, *supra* note 58, art. 37.

111. *See* State *ex rel* Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 387 (Mo. 1978) (strongly disapproving of *in camera* examination of assertedly privileged documents). *Accord* State v. Doster, 284 S.E.2d 218, 220 (S.C. 1981), *cert. denied*, 454 U.S. 1030 (1981). *Contra* Law Off. of Bernard D. Morley v. MacFarlane, Colo. 647 P.2d 1215, 1217 (Colo. 1982).

112. *See supra* notes 31-35 and accompanying text.

in common by the Member States.¹¹³ Thus, the protection offered by the Community's attorney-client privilege encompasses no more than the shared elements of England's "legal professional privilege,"¹¹⁴ France's "*le secret professionnel*,"¹¹⁵ Italy's "*il segreto professionale*,"¹¹⁶ and so on, for all of the Member States.

The Court of Justice buttressed its decision to adopt a consensus rather than synthesis rule by declaring that: "Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality."¹¹⁷ A vast body of authority cited by the Advocate General, however, suggests that the court is not limited to the Member States' consensus rule in interpreting Community law.¹¹⁸ Rather, the court may always examine national law on a comparative basis to discover a distinct, unwritten principle of Community law.¹¹⁹ The court, ignoring its prerogative to operate independently of national laws, found a regrettable rule of decision in the common denominator approach which can be criticized on several grounds.

First, the Court of Justice, by focusing upon commonalities in the Member States' *rules* of privilege, adopted a composite rule which does not accurately reflect the underlying *policies* of the Member States' rules. Most notably, the court denied the privilege to communications with in-house counsel because that is the black letter rule in some Member States.¹²⁰ The court was aware, however, that the rule excluding in-house counsel from the privilege originated from the fact that in-house counsel are not subject to professional ethics in some states.¹²¹ The court should have excluded only attorneys who were not subject to professional ethics. Such a rule would have been consistent with the common policy of the Member States to deny professional privilege to lawyers who are not subject to professional discipline, while giving the broadest effect to the reasons for recognizing an attorney-client privilege in Community law by extending the privilege to communications with otherwise eligible in-house counsel.

113. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1611, [1982] 2 Comm. Mkt. L.R. at 323.

114. *See* *Waugh v. British Ry. Bd.*, [1980] A.C. 521, [1979] 2 All E.R. 1169.

115. *Code Pénal*, art. 378 (Fr.).

116. *Codice Penale*, art. 381 (Italy).

117. *A.M. & S.*, 1982 E. Comm. Ct. J. Rep. at 1610, [1982] 2 Comm. Mkt. L.R. at 322-23.

118. *Id.* at 1649-50, [1982] 2 Comm. Mkt. L.R. at 303-05 (Opinion of Advocate General).

119. *Id.*

120. *See supra* text accompanying note 30.

121. *See supra* notes 49-51 and accompanying text.

Second, the common denominator analysis resulted in a weak rule that bears little relationship to the Community policies sought to be fostered by the court. The *A.M. & S.* rule deprives large classes of clients of a privilege which was, by the court's own admission, an essential corollary to the defendants' rights sought to be protected against Commission search and seizure powers.¹²² Clients consulting in-house and non-Community counsel have no assurance that written legal advice will be outside of the Commission's reach, though these clients have no less an interest in a full and fair defense than do other clients. The court can be faulted for relying on a mechanical analysis to justify a painfully narrow rule in an area which demands a complete analysis of the relevant national and Community policies involved.

Third, the common denominator approach makes concessions to national separatism by relying upon national law to formulate a Community rule. The court itself stated that the circumstances of *A.M. & S.* were ripe for a rule recognizing the need for a Community solution to a supranational problem.¹²³ The court's failure to advance such a solution was an opportunity lost for the court to advance Community integration.

It remains to be seen whether the *A.M. & S.* decision indicates a policy of the Court of Justice to apply a common denominator approach on other issues. In applying the *A.M. & S.* standard to future privilege cases, however, the court will presumably look to the common rules of the Member States for guidance unless the Council promulgates legislation specifically addressing the issue of attorney-client privilege in Community law.

IV. CONCLUSION

Attorneys who are subject to Community jurisdiction should be aware of *A.M. & S.*'s effect upon the rights of their clients acting in Europe. To the extent that the Court of Justice rejected the Commission's claim that no attorney-client privilege exists at all in Community law, *A.M. & S.* is a welcome development. It is now settled that in principle Community law protects the confidentiality of communications between counsel and corporate clients. The scope of the Community privilege, however, is limited to communications made for purposes of the client's defense. Furthermore, in-house counsel are not covered, and all non-Community lawyers may be outside of the doc-

122. Regulation 17, *supra* note 23, arts. 11 & 14.

123. *See supra* text accompanying note 55.

trine. Additionally, it is unclear what conduct may constitute a waiver of the privilege. It is also uncertain whether the Court of Justice will always require inspection of the contested documents *in camera* by the judges in determining the applicability of the legal privilege. Finally, while *A.M. & S.* strongly suggests that the rules of decision applied by the court in attorney-client privilege cases will be limited by the "common denominator" of the Member States' rules, it remains to be seen whether this will be workable in practice, or whether a distinct "Community common law" will emerge to fill the interstices of the general rule laid down in *A.M. & S.*

Perhaps the most significant unanswered question is whether the Council will promulgate specific legislation on the subject, thus allaying some doubt as to the state of the privilege in the Community. Moreover, the time may be ripe for the United States, the Community and the Member States, *inter se*, to consider signing conventions for the mutual or reciprocal recognition of professional privileges.